



## **I. INTRODUCTION**

Glidewell has submitted supplemental declarations from many of their employee witnesses to create new issues of fact that contradicts testimony given at deposition and produced during discovery. This is not permissible. “The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” *Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1111 (C.D. Cal. 2005); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). The Court should give no consideration to such testimony.

Additionally, Glidewell attempts to introduce evidence through new declarations to replace evidence they failed to disclose during discovery. This too is unacceptable. “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), **the party is not allowed to use that information or witness** to supply evidence on a motion.” Fed. R. Civ. P. 37(c) (emphasis added). These are new attempts by Glidewell to circumvent the Court’s Order Denying Glidewell’s *Ex Parte* Application to Amend the Scheduling Order [Doc. #74] and should not be considered by the Court.

For the reasons stated above and the detailed explanations below, the Court should not consider any of the testimony objected to below.

## **II. OBJECTIONS**

### **A. Objections to Supplemental Declaration of James Shuck [Doc. #116 Ex. R]**

	<b>Testimony</b>	<b>Objection</b>
1.	Supp. Shuck Decl. ¶¶ 2-7, 10, 13-15. Entire paragraphs.	Lack of personal knowledge (FRE 602). Mr. Shuck has not presented evidence to show that he has personal

1		<b>Testimony</b>	<b>Objection</b>
2			knowledge of the testimony he
3			presents in these paragraphs. A
4			single claim to being the Vice
5			President of Sales and Marketing is
6			not sufficient testimony to show that
7			he has personal knowledge of the
8			exact figures and statements made in
9			these paragraphs. To the extent he
10			relies on business records to produce
11			this information, the business records
12			needed to be produced during
13			discovery.
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17	2.	Supp. Shuck Decl. ¶¶ 2-7, 9, 13.	Best Evidence (FRE 1002). The best
18		Entire paragraphs.	evidence of the information of
19			Glidewell's marketing numbers, sales
20			figures and the contents of its IFUs
21			are the actual documents.
22			Additionally, the best evidence of the
23			content of Glidewell's promotional
24			and marketing materials is copies of
25			those actual materials and not Mr.
26			Shuck's characterization of those
27			materials.
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	Testimony	Objection
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2	3. Supp. Shuck Decl. ¶¶ 2-7, 10, 13-	Failure to Disclose (Fed. R. Civ. P.
3	15.	37(c)). (If a party fails to provide
4		information or identify a witness as
5		required by Rule 26(a) or (e), <b>the</b>
6		<b>party is not allowed to use that</b>
7		<b>information or witness</b> to supply
8		evidence on a motion) (emphasis
9		added). The entirety of these
10		paragraphs contains advertising and
11		marketing numbers, sales figures, and
12		factual assertions based on
13		documentary evidence that was not
14		disclosed during discovery and
15		therefore Glidewell should not be
16		allowed to rely on this information.
17		Particularly telling is the fact that
18		Glidewell has not cited to a single
19		document to substantiate these
20		claims.
21	4. Supp. Shuck Decl. ¶¶ 3-4, 6	Contrary to previous testimony.
22		“The general rule in the Ninth Circuit
23		is that a party cannot create an issue
24		of fact by an affidavit contradicting
25		his prior deposition testimony.”
26		<i>Harris v. Del Taco, Inc.</i> , 396 F. Supp.
27		2d 1107, 1111 (C.D. Cal. 2005);
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	Testimony	Objection
		<p><i>Kennedy v. Allied Mut. Ins. Co.</i>, 952 F.2d 262, 266 (9th Cir. 1991).</p> <p>At deposition as Glidewell's designated representative under Fed. R. Civ. P. 30(b)(6), Mr. Shuck testified that he did not have knowledge of the sales figures for Glidewell. He is now claiming to have personal knowledge of these numbers and asks the Court to accept his claims. Glidewell did not produce any documents during discovery to substantiate these claims.</p>
5.	<p>Supp. Shuck Decl. ¶ 8</p> <p>"it is estimated that the majority of other dental labs spend no more than \$150,000 per year in advertising costs for Dental Trade Magazine."</p>	<p>Lack of Personal Knowledge (FRE 602). Mr. Shuck does not have personal knowledge of the advertising budgets of other dental labs.</p> <p>Improper Opinion Testimony (FRE 701, 702). Mr. Shuck's opinion on what other dental labs spend on advertising is an improper opinion and not supported by the evidence.</p>

**B. Additional Objection to First Declaration of James Shuck [Doc. #90 Ex. G]**

	Testimony	Objection
1. “The term ‘bruxzir’ is not used by Glidewell – or, to my knowledge, widely or generally used by anyone else – to refer to solid zirconia crowns.”	Shuck Decl. ¶ 14	Improper Opinion Testimony (FRE 701, 702). Mr. Shuck is not qualified as an expert nor did he submit an expert report in this matter. His opinion as to how the term bruxzir is used by “anyone else” is inadmissible.

**C. Objections to Supplemental Declaration of Michael DiTolla [Doc. #116 Ex. S]**

	Testimony	Objection
1. Entire paragraph.	Supp. DiTolla Decl. ¶ 2	Contrary to previous testimony. To the extent Dr. DiTolla’s testimony attempts to infer an understanding of the dental industry outside of Glidewell’s own clients, it is contradicted by his previous deposition testimony. At deposition Dr. DiTolla testified, “I really can’t speak for the industry. Most of the people who I deal with are clients who are dentists at Glidewell.” (Jankowski, Ex. 4 at 89.) “The general rule in the Ninth Circuit is

	Testimony	Objection
		that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” <i>Harris v. Del Taco, Inc.</i> , 396 F. Supp. 2d 1107, 1111 (C.D. Cal. 2005); <i>Kennedy v. Allied Mut. Ins. Co.</i> , 952 F.2d 262, 266 (9th Cir. 1991).

**D. Objections to Supplemental Declaration of Robin Carden [Doc. #116 Ex. U]**

	Testimony	Objection
1.	Carden Decl. ¶ 3 Glidewell’s R&D department will implement a certification process which includes an extensive validation process to ensure that the personnel of such dental labs are properly trained and equipped to make BruxZir solid zirconia crowns and bridges that are of the same quality as those made by Glidewell, using the BruxZir-brand zirconia milling blanks sold by Glidewell.	Contrary to previous testimony. Mr. Carden is the Vice President for Research & Development (“R&D”). (Mangum Decl., Ex. 51 at 8:7-8.) Mr. Bartolo is the Sales Manager for Glidewell Direct, a department under the operations department and which used to be under the advertising and marketing department. (Jankowski Decl. [Doc. # 91] Ex. 5 at 6:16-17; 26:7-28:19.) Thus, R&D and Glidewell Direct are two separate departments within Glidewell.  At deposition Mr. Carden, Vice President of R&D, was asked whether

1		<b>Testimony</b>	<b>Objection</b>
2			it was his department that handled the
3			certification process for authorized
4			labs:
5			“Q: Is that your department who does
6			that?
7			A: No. That’s Glidewell Direct.”
8			(Mangum, Ex. 51 at 211:11-12.)
9			Later, Mr. Carden is asked which
10			department works with the labs “before
11			the lab is actually operating with the
12			[zirconia blanks so that] Glidewell has
13			spent time with them to have a comfort
14			level that it knows what it’s doing with
15			the blanks.” Mr. Carden’s response is
16			“Glidewell Direct.” ( <i>Id.</i> at 212:11-19.)
17			Mr. Carden is now trying to testify in
18			his supplemental declaration that it is
19			his R&D department rather than
20			Glidewell Direct that implements the
21			certification process. This testimony
22			should not be admitted as it contradicts
23			Mr. Carden’s testimony at deposition.
24			“The general rule in the Ninth Circuit
25			is that a party cannot create an issue of
26			fact by an affidavit contradicting his
27			prior deposition testimony.” <i>Harris v.</i>
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	Testimony	Objection
		<i>Del Taco, Inc.</i> , 396 F. Supp. 2d 1107, 1111 (C.D. Cal. 2005); <i>Kennedy v. Allied Mut. Ins. Co.</i> , 952 F.2d 262, 266 (9th Cir. 1991).
2.	Carden Decl. ¶¶ 4-6 Entire paragraphs	<p>Lack of Personal Knowledge (FRE 602). As discussed in objection #1 above, Mr. Carden testified at deposition that it is not his department that conducts the certification process and therefore he cannot rely on his statement that his R&amp;D department conducts this certification process. Therefore, Mr. Carden has not presented sufficient evidence to prove he has personal knowledge of the testimony in these paragraphs.</p> <p>Contrary to previous testimony. As mentioned in objection #1 above, Mr. Carden testified that Glidewell Direct was responsible for the certification process of “authorized” labs, not his R&amp;D Department. In addition, Mr. Bartolo, the Sales Manager of Glidewell Direct testified as follows regarding the “certification”</p>

1		<b>Testimony</b>	<b>Objection</b>
2			and quality control processes with
3			“authorized” labs:
4			“Q. What does a lab do to become an
5			authorized lab of Glidewell?
6			A. They need to buy BruxZir blocks on
7			a regular basis, BruxZir coloring
8			liquids on a regular basis, and that's
9			how they get into the system. In order
10			to stay, we need to see a steady flow of
11			orders.”
12			(Jankowski, Ex. 5 at 58:21-59:5.)
13			“Q. Do Glidewell personnel regularly
14			inspect the premises of the facilities of
15			the authorized labs?
16			A. We do not.
17			Q. And do Glidewell personnel review
18			samples of full zirconia dental
19			restorations made by the authorized
20			labs using the BruxZir blocks?
21			A. Occasionally, but that would be
22			more of a technical question. They
23			may ask if indeed this is looking the
24			way it should or how can they improve
25			the aesthetics, and we may help them
26			like we talked about before. We want
27			authorized labs to offer the same
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	Testimony	Objection
		<p>product we do and offer the same translucency and same aesthetic benefits. If they have questions about how to improve their output, we will certainly do our best to help them. But we don't have a monitoring system.</p> <p>Q. Right. So it's in response to them contacting Glidewell that this would happen?</p> <p>A. Yes.”</p> <p>(Jankowski, Ex. 5 at 63:16-64:15.)</p> <p>“Q. Is there any kind of, like, level of quality that the authorized labs have to maintain to remain an authorized lab?</p> <p>A. No, beyond using the technique and the product. They should get similar results.</p> <p>Q. And how do you know if they're using the technique or not?</p> <p>A. For us, it's the use of blocks and the liquid. Those are the two main ingredients.”</p> <p>(Id. at 64:22-65:4.)</p> <p>“Q. Does Glidewell Labs require its authorized lab to provide Glidewell with any data on the returns or product</p>

1		<b>Testimony</b>	<b>Objection</b>
2			defects associated with dental
3			restorations that the authorized labs
4			create with the BruxZir blocks?
5			A. They're not required, no.”
6			(Id. at 69:9-14.)
7			This testimony of Mr. Carden should
8			not be admitted as it contradicts
9			testimony Glidewell provided at
10			deposition.
11			“The general rule in the Ninth Circuit
12			is that a party cannot create an issue of
13			fact by an affidavit contradicting his
14			prior deposition testimony.” <i>Harris v.</i>
15			<i>Del Taco, Inc.</i> , 396 F. Supp. 2d 1107,
16			1111 (C.D. Cal. 2005); <i>Kennedy v.</i>
17			<i>Allied Mut. Ins. Co.</i> , 952 F.2d 262, 266
18			(9th Cir. 1991).
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20		Carden Decl. ¶ 7-8	Lack of Personal Knowledge (FRE
21		Entire paragraphs.	602). Mr. Carden states that he has
22			worked only in the Research and
23			Development department at Glidewell
24			and has not provided any evidence that
25			he has any responsibilities with filling
26			orders for milling blanks placed by
27			“authorized” labs. Therefore, Mr.
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	Testimony	Objection
		Carden has not provided evidence that he has personal knowledge of the facts put forth in these paragraphs.
	Carden Decl. ¶ 8 Entire paragraph.	Lack of Personal Knowledge (FRE 602). Mr. Carden states that he has worked only in the Research and Development department at Glidewell and has not provided any evidence that he has any responsibilities with communicating with customers by sending them “IFUs.” Therefore, Mr. Carden has not provided evidence that he has personal knowledge of the facts put forth in this paragraph.
	Carden Decl. ¶ 9 Entire paragraph.	Lack of Personal Knowledge (FRE 602). Mr. Carden states that he has worked only in the Research and Development department at Glidewell. Mr. Carden has not provided evidence that he has personal knowledge of the facts put forth in this paragraph.
	Carden Decl. ¶ 11 Entire paragraph.	Lack of Personal Knowledge (FRE 602). Mr. Carden states that he has worked only in the Research and Development department at Glidewell. He does not provide any testimony to

	Testimony	Objection
		establish he has personal knowledge of the technical support provided to the “authorized” labs. Mr. Carden has not provided evidence that he has personal knowledge of the facts put forth in this paragraph.
	Carden Decl. ¶¶ 11-12 Entire paragraphs.	<p>Lack of Personal Knowledge (FRE 602). Mr. Carden states that he has worked only in the Research and Development department at Glidewell. He does not provide any testimony to establish he has personal knowledge of the summary and conclusory statements in these paragraphs. Mr. Carden has not provided evidence that he has personal knowledge of the facts put forth in these paragraphs.</p> <p>Improper Opinion Testimony (FRE 701, 702). Mr. Carden improperly provides opinion testimony on the level of training, support and instruction that is provided to the “authorized” labs as well as the effect of these efforts.</p>

**E. Objections to Supplemental Declaration of Robin Bartolo [Doc. #116 Ex. V]**

	<b>Testimony</b>	<b>Objection</b>
2.	Bartolo Decl. ¶ 7 “Indeed, representatives from Authorized BruxZir Labs have told me that they are very happy and satisfied with this relationship.”	Hearsay (FRE 801, 802). Statements made to Mr. Bartolo are out of court statements which are being offered to prove the truth of the matter asserted.
3.	Bartolo Decl. ¶ 13 “Glidewell provides extensive technical support for its Authorized BruxZir Labs if they encounter any quality issues in connection with the manufacture of BruxZir-brand crowns and bridges. Typically, an Authorized BruxZir Lab sends the problematic BruxZir solid zirconia crown or bridge to Glidewell for analysis.”	Contrary to previous testimony. To the extent Glidewell is trying to infer this is a common practice, it is contrary to prior deposition testimony. Mr. Bartolo previously testified: “Q. And do Glidewell personnel review samples of full zirconia dental restorations made by the authorized labs using the BruxZir blocks? A. Occasionally, but that would be more of a technical question. They may ask if indeed this is looking the way it should or how can they improve the aesthetics, and we may help them like we talked about before. We want authorized labs to offer the same product we do and

1		<b>Testimony</b>	<b>Objection</b>
2			offer the same translucency and same
3			aesthetic benefits. If they have
4			questions about how to improve their
5			output, we will certainly do our best
6			to help them. <b>But we don't have a</b>
7			<b>monitoring system.</b>
8			Q. Right. So it's in response to them
9			contacting Glidewell that this would
10			happen?
11			A. Yes.”
12			(Jankowski, Ex. 5 at 63:20-64:15.)
13		Bartolo Decl. ¶¶ 20-21	Improper Opinion Testimony (FRE
14		Entire paragraphs.	701, 702). Mr. Bartolo improperly
15			provides opinion testimony on the
16			level of training, support and
17			instruction that is provided to the
18			“authorized” labs as well as the effect
19			of these efforts.
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21			Contrary to prior testimony.
22			To the extent Mr. Bartolo is claiming
23			that Glidewell takes active steps to
24			ensure quality other than monitoring
25			the sales of the zirconia blanks and
26			coloring liquid, this statement is
27			contrary to his prior deposition
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	Testimony	Objection
		<p>testimony. He previously testified:</p> <p>“Q. Is there any kind of, like, level of quality that the authorized labs have to maintain to remain an authorized lab?</p> <p>A. No, beyond using the technique and the product. They should get similar results.</p> <p>Q. And how do you know if they're using the technique or not?</p> <p>A. For us, it's the use of blocks and the liquid. Those are the two main ingredients.”</p> <p>(<i>Id.</i> at 64:22-65:4.)</p> <p>This testimony should not be admitted as it contradicts Mr. Carden’s testimony at deposition.</p> <p>“The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.”</p> <p><i>Harris v. Del Taco, Inc.</i>, 396 F. Supp. 2d 1107, 1111 (C.D. Cal. 2005);</p> <p><i>Kennedy v. Allied Mut. Ins. Co.</i>, 952 F.2d 262, 266 (9th Cir. 1991).</p>

**III. CONCLUSION**

Based upon the objections that Keating has made with respect to the above-identified portions of the Declarations of Jim Shuck, Dr. Michael DiTolla, Robin Carden, and Robin Bartolo, Keating respectfully requests that the Court strike and not consider the identified declaration portions in deciding Glidewell's motion for partial summary judgment.

Respectfully submitted,

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Dated: December 3, 2012

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